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COMPANY-CALIFORNIA and VALERO
MARKETING AND SUPPLY COMPANY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

PETROLEUM SALES, INC.,
Plaintiff,
vs.
VALERO REFINING COMPANY –
CALIFORNIA, VALERO MARKETING
AND SUPPLY COMPANY, and DOES 1
through 20,
Defendants.

No. C 05-3526 SBA

DEFENDANTS' OBJECTIONS TO
EVIDENCE SUBMITTED BY
PLAINTIFF IN OPPOSITION TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

Date: December 19, 2006
Time: 1:00 P.M.
Courtroom: 3

Defendants VALERO REFINING COMPANY-CALIFORNIA and VALERO MARKETING AND SUPPLY COMPANY ("Defendants") submit the following objections to evidence submitted by plaintiff Petroleum Sales, Inc. ("PSI") in its opposition to Defendants' motion for summary judgment.

I. OBJECTIONS TO DECLARATION OF BEN SHIMEK (Dkt. 76, Ex. 1).

Federal Rule of Civil Procedure 56(e) requires that affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein... [and] [s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." *See* Fed. R. Civ. P. 56(e); *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 774 n.9 (9th Cir. 2002) Mr. Shimek fails to show that he is competent to testify to the matters stated in his declaration and fails to authenticate the documents upon which he relies.

A. Objections to Exhibits 2, 3, 5, 7, 11, 21 and 37.

These letters are not properly authenticated. Only admissible evidence that has been properly authenticated may be considered on a motion for summary judgment. *Orr*, 285 F.3d at 773. Mr. Shimek does not authenticate these letters through personal knowledge. "A document can be authenticated [under Rule 901(b)(1)] by a witness who wrote it, signed it, used it, or saw others do so." F.R.E. 901(b)(1). Nor does he authenticate these documents by any other method set forth in Rule 901. F.R.E. 901.

B. Objection to Exhibits 4, 6 and 10.

These letters to and from third parties are not properly authenticated. F.R.E. 901, 902. That Mr. Shimek received the document from PSI's attorney or the addressee of the letter does not establish their accuracy or genuineness. *See Orr*, 285 F.3d at 733 n.7.

C. Objection to Exhibit 25.

These documents are not properly authenticated. F.R.E. 901, 902. Mr. Shimek testifies that these "are copies of Credit Memos faxed by Valero Marketing...." He fails,

1 however, to testify as to their accuracy or genuineness based on personal knowledge or
2 otherwise. *See Orr*, 285 F.3d at 733 n.7.

3 D. Page 2:23-28, 4:22-28.

4 Lack of personal knowledge. F.R.E. 602. "A witness may not testify to a matter
5 unless evidence is introduced sufficient to support a finding that the witness has personal
6 knowledge of the matter." F.R.E. 602. Mr. Shimek states that he "discovered" that the
7 credit card processing system was too slow, but fails to establish that this "discovery" was
8 based on personal knowledge (as opposed to learning the matter second hand).

9 E. Page 22:5-7.

10 Hearsay (F.R.E. 801, 802) as to statement made by the non-party consultant
11 (Trimble) regarding whether the Card Guide prohibited PSI from processing third party
12 cards on a separate network.

13 F. Page 23:2-3.

14 Hearsay (F.R.E. 801, 802) as to statement made by the non-party consultant
15 (Trimble) regarding the requirements to authorize Valero's cards on PSI's network.

16 G. Page 6:13-16.

17 Hearsay (F.R.E. 801, 802) as to statement made by the non-party consultant (Paul)
18 regarding damages resulting from non-payment of facilities allowance.

19 H. Page 6:21-7:4.

20 Lack of personal knowledge concerning PSI's electronic funds transfers. F.R.E.
21 602.

22 I. Page 6:4-5.

23 Hearsay (F.R.E. 801, 802) as to statement made by the non-party (Barrantes)
24 regarding the manner in which Valero Marketing debited and credited Valero dealers.

25 J. Page 7:6-22.

26 Lack of personal knowledge concerning whether Valero stations were in
27 competition with one another. F.R.E. 602.

1 This testimony also improperly seeks to create a triable issue of fact by
 2 contradicting Mr. Shimek's prior deposition testimony. Paragraph 31 states that PSI's
 3 Lombard street and San Rafael (*i.e.*, "Northgate") stations compete with the jobber-supplied
 4 Valero station at 100 Marinwood. In deposition, Mr. Shimek testified that the only Valero
 5 stations PSI's Northgate and Lombard stations competed with were each other. Shimek
 6 Dep., p. 220:12-24 (PSI Northgate station only competes with PSI's Lombard station); p.
 7 222:6-15 (PSI Lombard station only competes with PSI Northgate station) [Phelps Decl., ¶
 8 11, Exh. J]. This is improper. *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544
 9 (9th Cir.1975).

10 K. Page 7:16-22.

11 Irrelevant. F.R.E. 401, 402. PSI's Kentfield station is not at issue in this action.

12 L. Page 7:19-22.

13 Hearsay (F.R.E. 801, 802) as to statement made by the non-party (Valero jobbers
 14 and dealers) regarding whether Valero Marketing sold petroleum to Valero jobbers at
 15 wholesale.

16 II. OBJECTIONS TO DECLARATION OF MICHAEL TRIMBLE (Dkt. 76, Ex. 8).

17 A. Page 2:12-2, 3:28-4:7.

18 Lack of personal knowledge. F.R.E. 602. Also improper opinion testimony for
 19 purposes of summary judgment. Mr. Trimble testifies to the speed of credit card
 20 authorization, but fails to establish the basis for this understanding. PSI's reference to
 21 Trimble's "naked opinion" is insufficient to establish triable issues of fact. *E.g., Mid-State*
 22 *Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989).

23 B. Page 5:16-24.

24 Witness lacks of scientific, technical or specialized knowledge to draw conclusions
 25 concerning whether the Credit Card Sales Guide precluded PSI from using its own credit
 26 card processing system to process Valero and third-party credit cards. F.R.E. 702.

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1 C. Page 7:5-23.

2 Lack of personal knowledge. F.R.E. 602. Also improper opinion testimony for
3 purposes of summary judgment. Mr. Trimble testifies about whether the PSI stations were
4 in competition with other Valero stations, but fails to establish the basis for his
5 understanding.¹ PSI's reference to Trimble's "naked opinion" regarding alleged
6 competition is insufficient to establish triable issues of fact. *E.g., Mid-State Fertilizer*
7 *Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989).

8 Irrelevant. F.R.E. 401, 402. Mr. Trimble's opinion concerning the scope of
9 competition among service stations from 1996-1999 relates to a time period that is not at
10 issue in this case. Thus, PSI cannot rely on this evidence to create a triable issue of material
11 fact.

12 III. OBJECTIONS TO DECLARATION OF BARRY BEN-ZION (Dkt. 76, Ex. 14).

13 Improper expert testimony for purposes of summary judgment. Ben-Zion's
14 conclusory statements regarding the scope of competition among service stations is
15 insufficient to raise a triable issue of material fact. *E.g., Mid-State Fertilizer Co. v.*
16 *Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989).

17 Testimony regarding the MPSI model (Ben-Zion Decl., ¶ 11) is improper and must
18 be excluded pursuant to F.R.C.P. 37(c)(1). At deposition, Ben-Zion affirmatively
19 disclaimed any opinion on the validity of the MPSI model and stated he had not been
20 engaged to offer any opinions on it. Ben-Zion Dep., p. 89:8-14 [Phelps Suppl. Decl., ¶ 2,
21 Exh. Y].

22 Testimony regarding scope of competition among service stations is improper to the
23 extent it purports to contradict the deposition testimony of PSI's president, Ben Shimek, on
24 the same subject. PSI is not permitted to raise a triable issue of fact by submitting a
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26 ¹ Defendants similarly object to this evidence on the grounds of lack of personal
27 knowledge (F.R.E. 602) to the extent that Mr. Trimble's understanding is based on
28 observations made by station managers.

1 purported expert declaration that contradicts the unequivocal testimony of PSI's president.

2 *See Block v. City of Los Angeles*, 253 F.2d 410, 419 n. 2 (9th Cir. 2001) (summary

3 judgment affidavit cannot contradict prior stipulated facts)

4 IV. OBJECTIONS TO DECLARATION OF DANE DURHAM (Dkt. 76, Ex. 35).

5 A. Objection to Exhibits 12 and 32.

6 These emails and their attachments are not properly authenticated. F.R.E. 901, 902.

7 The declarant, Mr. Durham (Attorney for PSI) fails to testify as to the accuracy or

8 genuineness of these documents based on personal knowledge or otherwise. *See Orr*, 285

9 F.3d at 733 n.7.

10 B. Objection to Exhibits 31 and 33.

11 These documents are not properly authenticated. They are documents created by

12 third party MPSI Systems Inc., in response to a subpoena issued by PSI. Mr. Durham fails

13 to testify as to the accuracy or genuineness of these documents based on personal

14 knowledge or otherwise. *See Orr*, 285 F.3d at 733 n.7.

15 C. Objection to Exhibits 9, 13A, 13B, 15, 16, 17, 19, 24, 34.

16 These deposition excerpts are not properly authenticated. Authentication of

17 deposition excerpts must include "the reporter's certification that the deposition is a true

18 record of the testimony of the deponent." *See Orr*, 285 F.3d at 773 (affirming summary

19 judgment and excluding opposing deposition excerpts). A statement by counsel that the

20 excerpt is a "true and correct copy" is insufficient, "even if the affiant-counsel were present

21 at the deposition." *Id.* Here, Mr. Durham does not even say that much.

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1 Dated: December 5, 2006.

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